rights-of-way." TCI Cablevision, supra at para. 103.

This means that cities must have the authority and flexibility to act as changing circumstances warrant. Cities, like any governmental entity including the Commission, must continually review and update their statutes and regulations as necessary to perform their legislative function, including imposing new requirements when deemed necessary to protect the public interest. Chibardun's interpretation of Section 253, that cities cannot impose new requirements on a new entrant if they were not imposed previously on an incumbent, is diametrically opposed to the obligation a city has to manage responsibly and effectively the use of the public rights-of-way for the current and future benefit of its citizens.

V. CONCLUSION

Chibardun's Petition is deficient on numerous counts. Chibardun has blatantly misstated facts and failed to provide the Commission with complete and accurate information relevant to its Petition. It seeks Commission preemption in an area where the Commission has no preemption authority. It has failed to show that the City adopted or imposed an impermissible prohibition on entry. Finally, Chibardun requests the Commission to prevent Rice Lake, and by implication other cities, from engaging in legitimate legislative activities required to perform the many vital tasks necessary for effective right-of-way management, and instead to lock Rice Lake into a regulatory structure that is outdated, precedes the adoption of the 1996 Act, and no longer serves the interests of Rice Lake's citizens.

The absurdity of Chibardun's position is revealed in the true character of the relief it seeks. Thus, Chibardun requests the Commission to preempt: (1) an initial *draft* License Agreement that Chibardun refused to even discuss or negotiate with the City; (2) an ordinance

adopted two months after Chibardun notified the City that it had cancelled its project and which the City has subsequently applied to the incumbent cable operator; (3) an ordinance that the City has not yet adopted; and (4) some other future action which the City has not yet taken.

Chibardun's Petition, and its dealings with the City prior to filing the Petition show that Chibardun has proceeded with a demonstrable lack of good faith. This case highlights another reason, although likely unintended, why Congress wisely decided that challenges to municipal right-of-way ordinances and management are not the proper subject of Commission proceedings, and belong in local federal courts. In addition to the unique facts and issues applicable to a city's right-of-way management, there are no consequences to a party that files a patently baseless petition. In federal district court a party can seek sanctions and attorneys fees if an opponent files an abusive or frivolous claim.[21] The Commission's rules and procedures, however, provide no remedy to a party that suffers injury from such a filing.[22] Thus, no matter how frivolous or unwarranted a right-of-way preemption petition might be, a city must expend the substantial resources necessary to respond. This can have a particularly harsh impact on small communities that may lack or have limited resources to defend itself in a distant and unfamiliar forum (i.e., the Commission).[23] Chibardun has placed Rice Lake in such a position.[24]

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[21] See Federal Rules of Civil Procedure, Rule 11.

[22] Although Section 1.17 of the Commission's rules prohibits making a misrepresentation or willful material omission bearing on any matter within the Commission's jurisdiction, the party against whom the misrepresentation or material omission is made has no recourse against the offending party.

[23] The desire not to force cities to appear before the Commission on questions of local government rights was one of the reasons Congress limited the Commission's preemption authority in right-of-way matters. See 141 Cong. Rec. S8170-8171 (June 12, 1995) (Statement of Sen. Feinstein); 141 Cong. Rec. S8212-8213 (June 13, 1995) (Statement of Sen. Gorton).

In TCI Cablevision, the Commission advised state and local governments of its expectations as they moved forward in adopting and implementing regulatory changes to address the new telecommunications landscape resulting from the 1996 Act. See TCI Cablevision, supra at paras. 76, 102-109. Just as the Commission expects state and local governments to proceed in good faith in processing permit applications and right-of-way authorizations for new service providers desiring to enter their markets, the service providers who seek entry (or at least claim that they do) should also proceed in good faith.

This case provides an example of a company that has not acted in good faith. It is likely no coincidence that Chibardun's chosen target is a small, rural community that perhaps Chibardun believed would not stand up to its antics. If Chibardun truly intended to provide a new service in Rice Lake, it would not have conducted itself as it did, including filing its right-of-way permit applications only 11 days before a self-imposed deadline for starting construction and then cancelling the project less than three weeks later. Chibardun's assertion that Rice Lake has prohibited its entry under the facts presented in this case is frivolous. If Chibardun had filed its Petition in federal district court replete with its misstatements and omissions of relevant facts, Chibardun would have been subject to Rule 11 sanctions. As it stands, the Commission should dismiss or deny Chibardun's Petition in the strongest terms possible.

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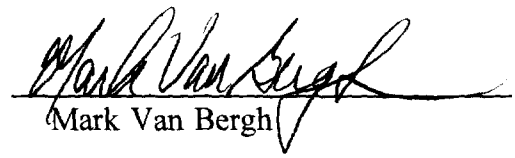
[24] Rice Lake has ably defended its actions in response to Chibardun's Petition, but at what cost to its citizens?

Respectfully submitted,

NATIONAL LEAGUE OF CITIES
NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS
AND ADVISORS

By: 
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January 6, 1997

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I, Diane Uduebor, a secretary at the law firm of Arter & Hadden LLP, hereby certify that on this 6th day of January, 1998, I have sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below:

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